(1)

Supreme Court, U.S.
FILED

02 1562 FEB 18 2003

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

MARGARET A. MADIGAN,
Petitioner, pro se,

v.

NABISCO BRANDS, INC./RJ REYNOLDS COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Margaret A. Madigan,
Petitioner, pro se
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49 pp

QUESTIONS PRESENTED

1) Whether family member/friend may speak on behalf of disabled person to request vital accommodations in work environment under section 902 of The Americans with Disabilities Act.

2) Whether statute of limitations on toxic tort should be extended when exposure to toxins is directly linked to failure to accommodate disability. (Thus aggravating and/or causing disability and/or other health problems) In order to be granted trial and 'or compensatory and punitive damages. (Under 1990 ADA and Mario Echazabal vs. Chevron)

3) Whether pro se litigant, especially one with a bona fide disability as per the ADA; such as multiple sclerosis, which has inherent characteristics that impede presentation, be expected to adhere to court procedure as rigorously as an attorney.

4) Whether it is sufficient to provide court with prima facie age discrimination claim under ADEA of 1967 (Especially when proof positive evidence provided to refute nondiscriminatory pretext) in order to grant trial on such basis or compensatory and punitive damages.

5) Whether an employer's acknowledgement and/or verbal agreement to provide accommodation for a disability should suffice as notification for implementation of accommodation, especially when proof per evidence given court, under ADA, in order to granted trial and/or compensatory and punitive damages.

6) Filing toxic tort as pro se litigant amounts to formal request for extension of statue of limitations.

7) Whether statute of limitations should be extended when toxin is ingredient in consumable products thus not known as toxin to the public who relies on the FDA and ATF agencies of federal government for protection.

8) Whether family member/friend may speak on behalf of disabled person who is proceeding pro se due to lack of financial resources and/or stamina in presenting federal case under section 902 of ADA.

9) Whether receipt of accrued benefits such as severance pay should be contingent upon signing away of civil rights as in separation letter presented to petitioner by respondent. (Exhibit #S)

10) Whether attorneys fees should be awarded to Defendant as they perpetuated litigation by not

responding to the EEOC's Determination dated 8/22/00, thus, EEOC gave Petitioner right to sue letter (pg. 3 of Exhibit 10 of HH)

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Margaret A. Madigan, an individual citizen of the United States, residing in the Northern District of Ohio. Margaret A. Madigan was the Plaintiff in the District Court, and the Appellee in the Sixth Circuit Court of Appeals.

Respondent

Per Respondent's "Disclosure of Corporate Affiliations and Financial Interest" statement in their Brief of Defendant-Appellee In The United States Court Of Appeals;

> "Kraft Foods North America, Inc., is the successor by merger to Nabisco Holdings Corp., formerly known as Nabisco Brands, Inc. Kraft Foods North America, Inc. is wholly owned by Kraft Foods, Inc. Kraft Foods Inc. is majority owned by Phillip Morris Companies, Inc. Phillip Morris Kraft Foods, Inc. is publicly traded."

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Blankship v. Cincinnati Milacron Chemicals,
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(1982), 69 Ohio St. 2.608

Fyffe v. Jeno's, Inc.
(1991) 59 Ohio St. 3d

Mario Echazabal v. Chevron

Washington (AP) A 6, Tuesday, June 11, 2002 Gazette

Statutes:

Section 902.3(b) of the ADA
Section 902.4c (1)(12) ADA
1990 ADA
ADEA OF 1967
TITLE VII
EPA
Ohio Constitution, Section 35, Article 2
Section 8a of the Restatement of the law 2d, Torts, Section of Prosser and Keeton on Torts (5ed. 1984)

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit order (App. A at 1a)(6th Cir. 2002)., The District Court opinion and order (App. B. at 3a) is reported at Margaret A. Madigan vs. Nabisco Brands, Inc./RJR Reynolds Company, Inc. (Ohio 2000). (not aware of this info., as pro se litigant)

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on September 16, 2002. The Court of Appeals entered an order denying a timely petition for rehearing on November 20, 2002.(App. C at a).

The constitutionality of statues of the State of Ohio, was drawn into question and shall be served on the Attorney General of the State of Ohio, 17th Floor, State Office Tower, 30 E. Brook Street. Columbus, Ohio 43215-3428. And, that the constitutionality of Acts of Congress was drawn into question and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory Provisions:

A. Section 902 of the ADA (902.3b & 902.4 (c)(1)12)

B. 1990 ADA

C. ADEA OF 1967

D. TITLE VII

E. EPA

F. Ohio Constitution, Section 35, Article II.

G. R.C. 4123.74 and 4123.741 [Blankenship v. Cincinnati Milacron Chemicals (1982), 69 Ohio St. 2.d608.]

H. Section 8 (A) of the Restatement of the Law 2d, Torts, Section 8 of Prosser & Keeton on Torts (5Ed.1984), [Fyffe v. Jeno's, Inc. (1991), 59 Ohio St. 3d] provides:

> "...in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure,

instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task."

Failure to accommodate disability is also toxic tort as the heat itself is toxin to Petitioner who suffers disability of multiple sclerosis. (Exhibit D, 21 and 52)

G. Mario Echazabal vs. Chevron [Washington (AP), A6, Tuesday, June 11, 2002, The Gazette]

1) This case is federal law's reinforcement of Ohio state law. 2) Just as an employee cannot risk his health at employer's expense, conversely, employer cannot mandate employee to risk his health. (Respondent removed Petitioner from temporary refuge, (Exhibit D.) - violating toxic tort law – See H above.

STATEMENT OF THE CASE

This case was filed by a pro se litigant who is afflicted with the disability of multiple sclerosis. As such, I have been unable to retain counsel due

to limitations of physical stamina, finances, and time. I have adhered to tenants of law. As a pro se litigant over the age of forty, afflicted with the disability of multiple sclerosis, I am not presumptuously attempting to argue law as if I was an attorney. However, I have provided the District, Appellate and now the Supreme Court with proof positive evidence of Failure to Accommodate my disability, Age Discrimination, including refute to nondiscriminatory pretext, and exposure to toxins – heat, cigarette smoke and aspartame dust.

The magnitude of the damages I've sustained and the strength of evidence presented justly warrants oral argument, jury trial of my peers, and/or compensatory and punitive damages.

The following is a concise, compelling description of damages sustained. I would appreciate the Supreme Court of the United States of America allowing justice to prevail by responding equitably to my requests. Opportunity to elaborate in oral presentation would let me span the bridge between legal jargon and justice for an American citizen afflicted with the disability of multiple sclerosis.

Due to the nature of the disability of multiple sclerosis, especially its inherent remitting-recurring exacerbations which are precipitated by stressful events as for example, the week long episode of slurred speech I suffered after deposition by the respondent; I am requesting that my sister – Lynn Madigan (introduced to court via Early Neutral Evaluation and acknowledged by Respondent in Exhibit J) – speak on my behalf to the court and jury under Section 902.4(c) (1) paragraph 12 of ADA. It would be a gross miscarriage of justice if she is not allowed to speak on my behalf as she is able to present proof positive of Respondent's failing to accommodate

my disability, committing age discrimination against me and exposing me to toxins – heat, cigarette smoke, and aspartame.

Had the Respondent complied with OSHA mandates for improving ventilation – made after inspecting plant for safe levels of aspartame dust; or had the respondent simply provided requested accommodation which would have caused no undue hardship, (Exhibit D Exhibit 13 of HH & Exhibit O) then the issues of this case, with the exception of age discrimination would have been avoided. Thus, I am seeking punitive damages in addition to compensatory damages so that others may not be subjected to such insidious, inhumane treatment.

REASONS FOR GRANTING THE PETITTION

I. The Decision of the Sixth Circuit is Incorrect.

A. Non-responsive to issue of Failure to Accommodate Disability. (The following lettered exhibits are those that were presented to Petitioner by Respondent at their deposition of her. Thus, they provide proof positive evidence of failure to accommodate disability and violation of toxic tort. These Exhibits were presented to the District Court in the Plaintiff's Response to the Defendant's Motion for Summary Judgment, Veterans Day, 11/11/01.)

(1) 6/29/95 Respondent's receipt of Dr. Kumar's letter which states diagnosis of

multiple sclerosis and the need to avoid increase in temperature. (Exhibit B)

(2) 7/18/95

""...Receipt of doctor's note) – which states Plaintiff is having flare up of multiple sclerosis""; (MV - Maryellen Valaitis – head of the human resource department at Seville, Ohio plant – initials and dates this document; in her capacity as human resources manager, it is presumed that she is aware that ADA and EEOC define multiple sclerosis as a disability). This Exhibit confirms that the Defendant acknowledged Plaintiff's disability and accepted this as a valid absence from work on 7/18/95. Thus, it is inane for the Defendant to reference the Plaintiff's "alleged disability" in there Motion for Summary Judgment of 11/5/01."" (Exhibit C)

(3) 9/3/96 – 12/21 96 Tim Ault's notes stating that he is aware of need and will proved accommodation (provided to petitioner by respondent during their deposition of her); no mention is made of filling out a form (Respondent's Exhibit D)

(4) 12/96 – 01/10/97 - Respondent's Exhibit J provides evidence that they received letter from Petitioner's sister requesting accommodation – signed for on 12/26/96; still did not provide or indicate to petitioner until 1/10/97 that a form needed to be filed. (ADA 902.4 (c) (1) paragraph 12.

(5) Petitioner was moved from temporary refuge in an empty office back to over-heated, toxin- laden environment. (Precipitating discussion and notes of 9/03/96) This illustrates that accommodation could have been made with no undue hardship for Respondent. OSHA report acknowledges unsafe levels of aspartame possible and advises improving ventilation throughout the plant; had the ventilation been sufficient, then the Petitioner would not have been exposed to excessive heat – as an individual with disability of multiple sclerosis – excessive heat is a toxin itself; subsequently, Petitioner was exposed to toxins of cigarette smoke and heated aspartame dust. (Incidentally, there were others diagnosed with multiple sclerosis at this plant. Including coworker who sat in section adjacent to Petitioner)

(6) This OSHA report is in deposition of Petitioner by respondent as an attachment to Relief Sought via Response to Motion to Strike which also includes details of disability and effect on daily life of Petitioner. (Exhibit D and 13 of HH)

(7) OSHA Report discovered and filed during pre-discovery period when Respondent requested more definite statement, thus, within statute of limitations.

(8) Respondent should not be awarded attorney's fees as they perpetuated case by not responding to EEOC's Determination letter. (Exhibit 10, HH)

(9) (4/21/97) "...Meeting Documentation File) – Supervisor Tim Ault notes...in 4) that accommodation still has not

occurred according to the Defendant. Additionally, there are several examples of Defendant negating their own arguments:" (Exhibit O)

(10) Tim Ault's letter to Plaintiff:

"Upon receipt of these completed forms, Nabisco will review the documentation and work with you to implement reasonable accommodations." This is a direct contradiction to both his assertion in Exhibit D 9/3/96 where he assures Plaintiff that accommodations will be made and mentions no need for Plaintiff to fill out any forms and his claim in Exhibit D 11/25/96 that he did respond to accommodation request. (Exhibit K)

(11) Point 2 of Response to Motion to Strike:

> ""According to Health Hazard Evaluation Report HETA 86-035-224, Nabisco Brands, Inc., Seville, Ohio: "Authors recommend that improvements be made to local exhaust ventilation in several areas of the facility, and also recommend implementation of a respiratory protection program." Although, Plaintiff's initial Amended Complaint was about lack of temperature control resulting from improper ventilation, this lack of ventilation also exposed Plaintiff to Aspartame Dust. (As did other aspects of job – handling materials)"" (Exhibit 13 of HH- OSHA Report)

(12) Point 3 of Response to Motion to Strike:

> "Subsequently, the continuing subjection to lack of ventilation after plaintiff was diagnosed with Multiple Sclerosis and had notified company of necessity of proper ventilation resulted in endangering Plaintiff's health by exposure to excessive heat and aspartame dust – both known to increase risk of Multiple Sclerosis exacerbation. (This type of Aspartame Exposure – Temperature exceeds 88°F – causes metabolic acidosis. The resulting Methanol Toxicity is a "death sentence." (Reference: Aspartame article World Environmental Conference and the Multiple Sclerosis Foundation.)" (Exhibit 12 of HH- Aspartame report)

(13) Point 5 of Response to Motion to Strike:

> ""Exposure to cigarette smoke toxins – designated smoking area was by Plaintiff's unventilated work area, original response to request for non smoking area was that unventilated work area, original response to request for non smoking area was that "RJR" – Defendant is a cigarette company thus indoor smoking facility."" (Exhibit 27 – Deposition Jean Boling)

B. Non-responsive to issue of proof positive Age Discrimination

(1) Honorable Judge Nugent acknowledges prima facie (Pg. 10 of his Opinion); that the Petitioner is capable of doing job. (Pg. 5 of Honorable Judge Nugent's Opinion)

(2) Respondent provides proof positive evidence that refutes their own nondiscriminatory pretext. (Pg. 18 - Brief of Defendant-Appellee acknowledges..."Madigan began performing the duties of both Traffic Clerk positions." Thus, Petitioner was being assessed as unable to keep up with workload while she was assuming responsibility of more than one person.

(3) OBES (Exhibit 11 of HH); Respondent did not have sufficient reason to deny unemployment benefits to Petitioner.

(4) 3/95 - 3/96 (Review) ""Maryellen writes notes on review which manipulate Bob Byers assessment ("V" in volume matches "V" of initials in Exhibit C)." (Exhibit HH (Exhibit 15))""

(5) 12/9/96 ""Maryellen states in e-mail to the Plaintiff "We will file away the 96 review prepared by Bob Byers" This is an example of the Defendant misrepresenting to the Plaintiff, the contents of her personnel file. Furthermore, If Maryellen's observations are valid, why does she not credit herself for them?"" (Exhibit HH (Exhibit 16))

(6) Point 7 of Response to Motion to Strike:

> "Nabisco, by withholding vacation pay and delaying unemployment

compensation from State of Ohio (exhibit #11 of HH) disabled Plaintiff's Cobra maintenance thus responsible for continuing life long health care insurance and nursing care insurance."

(7) Point 8 of Response to Motion to Strike:

"Plaintiff entitled to 9 months severance pay as this accounts for time which elapsed before plaintiff was able to secure employment." (Exhibit O and Exhibits 9 and 10 of HH)

(8) Point 9 of Response to Motion to Strike:

"Resignation constituted constructive discharge. IE. weekly reviews, continued to increase job responsibilities." (Exhibits D and O)

(9) Point 11 of Response to Motion to Strike:

""E.E.O.C. Determination "Chilling Effect". Exhibit 10 page 2 of 3 of HH.""

C. Decision was based on false assessment of rules of evidence.

(1) Proof positive evidence of failure to accommodate disability was ignored while unjustified credence was given to an alleged comment (Exhibit H) by a truck driver (not only

was this not notarized or in any way validated per rules of evidence, but, even if it were deemed admissible it was not sufficient testimony as the petitioner worked in Traffic Clerk position for eleven years, so, an interaction with one truck driver does not provide a representative sample of social skills.)

(2) "All of Ms. Madigan's reviews were subjective assessments..." (pg.2c, Statement of Issues of Reply Brief Plain-Appellant"

D. Decision violates ADA

Petitioner did not anticipate that Court would accept Respondent's unsubstantiated claim – a comment of a truck driver (Exhibit H) – as it did not comply with rules of evidence. It is reasonable that a pro se litigant with the disability of multiple sclerosis would believe Judge "calls" rules. Thus, Petitioner objected to evidence in page 7 of her Reply Brief and pages 2 and 3 of Petition for Rehearing.

As per 902.3.b of ADA, "Mental and emotional processes such as thinking, concentrating, and interacting with others are examples of major life activities." Thus, the Court is effectively discriminating against the Petitioner by accepting this Exhibit H as evidence.

E. Petitioner, as a pro se litigant with the disability of multiple sclerosis was denied oral arguments.

The court is perpetuating discrimination by not allowing opportunity for a disabled person to express charges in a format which may improve understanding of the nature of disability of multiple sclerosis; thus clarifying the

validity and magnitude of Petitioner's grievances. (Section 902 of ADA)

II. The Questions Presented are Important.

A. Nature of Multiple Sclerosis

(1) Remitting-recurring exacerbations

Point 4 of Plaintiff's Response to Motion to Strike:

"Plaintiff's observations on effects of Multiple Sclerosis on her daily life: (experiences of previous exacerbations also available) Incontinence, bowel and bladder function, difficulty in dealing with: societal view/stigmas towards Multiple Sclerosis, Making Plans – never know in advance how Ill feel, cognitive functioning, concentration, memory, vision, dexterity – dropping things, equilibrium, balance, relationships, walking – can't wear heels, platforms, can no longer dance, personal independence, grooming – combing hair, brushing teeth, washing hair, showering, bathing, buckling and/or tying shoes, physical pain, quality time, stamina, decreasing energy affecting job, interferes with needlework, Psychological suffering, TV and magazine advertisements, Mental Anguish of realization that co-workers as well as the public at large were exposed to possible effects of "overheating" of aspartame through

processing which involved excessive heat of raw material. As well as the torment of knowing that the resulting industrial waste product could potentially have contaminated the environment. "RJR also manufactured the "Winston" cigarettes that my Dad smoked before they "Got Naked" (Winston Ad Campaign) and he now exists on 5 liters O^2/continuously. Thus, I live daily with yet another reminder of their callous disregard for people. My realization of the stress it causes him to witness my degenerative condition which has included episodes of paralysis, blindness, inability to speak, swallow, hold a drinking glass."

(2) Invisible elements of multiple sclerosis:

Point 1 of Response to Motion to Strike:

""Plaintiff filed pro se thus effects of her exposure to aspartame – psychological and neurological as outlined by the "World Environment Conference and the Multiple Sclerosis Foundation," Make these observations inapplicable, (IE. Confusion, memory loss, irritability, personality changes."" (Exhibit 12 of HH)

(3) Point 6 of Response to Motion to Strike:

""Exhibit #4 which is doctor note excusing Plaintiff from jury duty states,"...she has Multiple Sclerosis,

and is subject to exacerbations with minimal exertion or long hours. I advise her to not perform jury duty." The defendant is perpetuating Plaintiff's "...exertion or long hours..." by not responding to EEOC's Determination dated 8/22/00. Thus, Defendant should not be "...awarded costs and attorney's fees."" (Exhibit 4 of HH)

(4) Section 902 of ADA:

Relative/friend must be allowed to speak on behalf of those afflicted with disabilities. (902.4(c)(1)(12))

(5) Page 5 of Plaintiff's Response to Motion for Summary Judgment:

"Unfortunately, Plaintiff's attempts to retain an attorney were to no avail.(Please note that Dr. Kinkle's current Evaluation Statement of 9/19/1..."(Exhibit 20 and 58; authorization for release of medical records from Dr. Kinkel, Dr. Finneran, and Dr. Katsaros - HH) "Easily Baffled by Directions")"; (note: Deposition Responses of Plaintiff, "I have no idea.")

"(Deposition was stressful for the plaintiff – she experienced episode of knees buckling, and speech slurring)": pg. 3 of Plaintiff's Response to Defendants Motion to Summary Judgment.

"Other examples are in opposing counsel's deposition of her on (pages 284, 285 and 286 Deposition "motion to compel" where defense counsel badgers Ms. Madigan for having difficulty recalling – an inherent quality of her Multiple Sclerosis)..." (page 7 of Reply Brief of Plaintiff-Appellant); Entire deposition was attached to Plaintiff's Response to Defendant's Motion for Summary Judgment.

B. EEOC's Chilling Effect

(1) Depositions: ("Chilling Effect" evidenced – only three responses, of more than thirty mailed); These exhibits – 26, 27, 28 are attached to Plaintiff's Response to the Defendant's Motion for Summary Judgment.

(a) George Dafo (Exhibit 28):

Questions 3, 11, 17 & 19

(b) Constance Bihari (Exhibit 26):

Questions 1, 2, 4, 5, 6, 7, 8, 10, 12, 13, 15, 17, 18, 19, 21, 22, 25

(c) Jean Boling (Exhibit 27):

Questions 1, 2, 3, 4, 5, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 21, 24 & 25

(2) (Exhibit 10 of HH, Pg 2)

Regarding Separation letter (Exhibit S, Exhibit 9 of HH):

> "Moreover, the waiver provision may produce a chilling effect, thereby undermining the Commission's ability to enforce Title VII, the ADEA, The EPA, and the ADA. These provisions may intimidate or have the effect of intimidating employees and create disincentives for them to cooperate with the EEOC in safeguarding the public interest."

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Pro Se

Margaret A Madigan
Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 09/16/02]
No. 02-3292

Margaret A. Madigan, Plaintiff-Appellant,	)
v.	)
Nabisco, RJ Reynolds, Defendant-Appellee.	)

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 1:00 2919 – Donald C. Nugent, District Judge.

Before: NORRIS, CLAY, Circuit Judges; O'MEARA, District Judge.*

* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court.

This notice is to be prominently displayed if this decision is reproduced.

ORDER

"Upon review, we affirm the district court's judgment for the reasons stated therein."

"s/_____"
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed February 19, 2002]

No. 1:00 CV 2919

MARGARET A. MADIGAN, *Plaintiff,*	)
v.	)
Nabisco Brands, Inc.,/ RJR Reynolds Company, Inc. *Defendant.*	)

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon the Defendant's Motion for Summary Judgment, ECF. The Plaintiff has filed a response to the motion and the Defendant has filed a reply. The matter is therefore fully briefed and ready for disposition. For the reasons that follow, the Defendant's Motion for Summary Judgment is GRANTED.

Procedural Background

The Plaintiff, Margaret Madigan, brought suit against Nabisco Brands, Inc./RJR Reynolds Company, Inc., ("Nabisco") on November 20, 2000. The Court granted the request and the Plaintiff filed an Amended Complaint. The case was then referred to Magistrate Judge Jack B. Streepy for pretrial supervision. Subsequently, the Plaintiff sought to amend her Complaint and her request was granted. However, the Court granted the Defendant's motion to dismiss two of the allegations in the Plaintiff's Second Amended Complaint.[1]

In her Second Amended Complaint[2], the Plaintiff alleges that Nabisco violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII), the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA"). In support of her allegations, the Plaintiff claims that certain named representatives of the Defendant's company blatantly ignored her disability even after she submitted a Job Accommodation Request Form. Specifically, the Plaintiff claims she never received a response to her requests for air-conditioning and for better ventilation. In fact, she claims that her work area was designated as the smoking area for Nabisco employees and her request that her work area be designated non-smoking was ignored.

---

[1] Specifically, those allegations were violation of Executive Order 503, 38 U.S.C. § 4212 and violation of the Occupational Safety and Health Act of 1970.

[2] It should be noted, the Plaintiff's Second Amended Complaint was really a supplement to the First Amended

With respect to her claims under Title VII, the ADEA, and the ADA, the Plaintiff claims specific representatives of Nabisco, "did have the effect of intimidated the Plaintiff on numerous occasions." Second Amend. Compl. at pg.2.

According to the Plaintiff's Second Amended Complaint, she was employed by the Defendant as shipping clerk for eleven years. She claims she always received favorable reviews of her work until March 1996 when the Manager for Human Resources, Maryellen Valaitis "manipulated and falsified" the review prepared by her direct supervisor, Bob Byers.

In August 1996, the Plaintiff applied for the position of Production Planner. Though Plaintiff claims she had "a great deal of knowledge of the operation of the plant and production needs" and her supervisor supported her being hired for the position, Ms. Valaitis and Mark Perkins, the plant Manager hired someone outside the company.

The Plaintiff further claims Ms. Valaitis, Mr. Perkins, and Tim Ault the Production Manager, continued to harass the Plaintiff by subjecting her to weekly job appraisals, additional job responsibilities, and abusive remarks. The Plaintiff alleges that in December 1996 she reported the harassment to an individual by the name of Sandi VonDralteln in the Human Resources Department in New Jersey. According to the Plaintiff was eventually terminated from her position with the Defendant. According to the Plaintiff, she was replaced by a woman twenty years her junior.

Following her termination, the Plaintiff claims that Mr. Perkins attempted to deny her

unemployment compensation and Ms. Valaitis reversed a direct deposit of the Plaintiff's earned vacation pay and she therefore had insufficient funds to pay for COBRA insurance resulting in cancellation of Plaintiff's health insurance.

Factual Background

The Plaintiff began working in the shipping department of Nabisco in 1986. Ms. Madigan's Dep. at 9, 21. While her performance appraisals were generally good prior to 1996. While her performance appraisals were generally good prior to 1996, as early as her first evaluation, she was advised that she needed to develop her "teamwork" skills and communication skills and that she failed to share information with other individuals in her department. Def.'s Ex. A. Her evaluation for 1996 was by far the worst performance appraisal she received. Among the deficiencies noted were:

--general warehouse and shipping files in disorder with no defined storage location;

--she does not effectively utilize distribution reports;

--she fails to assert herself by informing employees of incorrect information, requestinge corrections and follow-up;

--she needs to focus on communicating strategies or plans to reduce warehousing/shipping costs;

--She made severe moves to isolate herself from the warehouse team and peers. She isolated herself behind file cabinets in an effort to close off her environment. She chose not to attend communication meetings. In September, she allowed her system password to expire routinely. She would refuse to timely contact the help desk

which delayed shipments being entered until system access could be obtained;

--she does not source input from departments when addressing a cross-functional assignment;

--she does not accept feedback well.

The Plaintiff testified that in 1992, she told the then plant Manager, Bud Fisher, that she was diagnosed with a disability. Ms. Madigan's Dep. At 79. In 1995, after Mr. Fisher left the Defendant's employ, the Plaintiff provided the human resources department with a letter written in 1992 by Dr. Suresh Kumar of the Cleveland Clinic Foundation. Dr. Kumar states in part, "the overall picture seems to fit best with a demyelinating illness such as multiple sclerosis." Based on his findings, the doctor suggested the Plaintiff avoid situations which could potentially increase body temperature. Def.'s Ex. B. At some point between 1992 and 1995, the Plaintiff did advise someone in management that she needed better ventilation, meaning a better air flow and a non-smoking environment. Ms. Madigan's Dep. at 84. She complained about the ventilation problem often, but nothing was done about it. Id. At 85, 88. Though the Plaintiff claimed that she specifically needed air conditioning for her disability, she did not provide medical information establishing that she needed this accommodation. Id. at 96. At one point, the Plaintiff moved out of her office and into an office vacated by her former supervisor, Mr. Byers. According to notes from meetings between the Plaintiff andTim Ault, the Plaintiff moved to the vacant office to avoid cigarette smoke and because the temperature was better. Def's Ex.D. The notes from that meeting indicate that changes were to take place in the Plaintiff's work area including a mandatory no-smoking policy and improved temperature regulation. Def.'s Ex. D.

According to the Defendant, when the Plaintiff moved back to her work area, she exhibited poor teamwork and communication skills. It was at this point that she moved file cabinets to create a wall around her work area, isolating her from other employees. Def.'s Ex.H. The Defendant's notes from a December 20, 1996 meeting between Mr. Ault and the Plaintiff indicate among other things, that she addressed a shuttle driver in a "mean and nasty way". Def's Ex.H.

The day after the meeting between Mr. Ault and the Plaintiff, the Plaintiff's sister wrote a letter presumably to the Defendant with a carbon copy to Tim Ault, Mark Perkins, Maryellen Valaitis and Sandi VonDralteln. In that letter, the Plaintiff's sister advised that the Plaintiff was experiencing physical symptoms that could lead to a more serious exacerbation of her multiple sclerosis. She claimed that this was a direct result of undue stress and that her sister was being subjected to a hostile work environment. Def.'s Ex. J. Mr. Ault responded to the letter from Plaintiff's sister. In short, Mr. Ault explained that it was his responsibility to provide the Plaintiff with on-going feedback throughout the year. He also requested that the Plaintiff have a Job Accommodation Request Form completed by her physician. The letter advised that upon completion of the forms he would review the documentation with the Plaintiff and implement reasonable accommodations.

Documentation from meetings in 1997 between the Plaintiff and Mr. Ault indicate that Plaintiff was asked several times for documentation from her physician. Def.'s Ex.O, There is no evidence that documentation was ever produced. In fact, the Defendant claims that documentation was never submitted, and the Plaintiff has provided no evidenct to refute this claim. The Plaintiff did not

believe that the form applied to her situation, but she understood that was the procedure Mr. Ault was requesting her to follow. Ms Madigan's Dep. at 174, 184.

The meetings between Mr. Ault and the Plaintiff were held regularly in 1997. The minute sheets reflect that there were discussions regarding the disability accommodation and improving Plaintiff's teamwork and communication skills. It is clear that the Plaintiff suspected that she would be terminated in September and by the end of August and early in September, her suspicions were confirmed. The August 29 minutes reflect that Mr. Ault was going to recommend to Mr. Perkins that the Plaintiff's employment with Nabisco be terminated in September. The Plaintiff's employment with Nabisco was terminated on September 2, 1997. Def.'s Ex. O.

Discussion

Summary Judgment Standard

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV.P 56(c) The burden of showing the absence of any such "genuine issue" rests with the moving party:

> (A) party seeking summary judgment always bears the initial responsibility of informing the district court of its motion, and identifying those portions of "the pleadings, depositions,'

> which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 U.S. 317, 323 (1986) (citing FED. R. CIV. P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937,941 (6th Cir. 1995) (citing Celotex, 477 U.S. at 252). Accordingly, "(t)he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the (non-moving party) is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v.*

Bradford & Co., 886 F 2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (Cir. 1995). FED. R. CIV.P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence ar permissible. The Sixth Circuit has concurred with the Ninth Circuit that "it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" Wiley v. United States, 20F.3d 222, 225-26 (6th Cir. 1994)(quoting *Beyene v. Coleman Sec. Servs.*,

Inc., 854 F.2d 1179, 1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 Citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law.

" *Anderson*, 477 U.S. at 250.

Title VII Claim

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]" 42 U.S.C. § 200e-2(a)(1).

The Supreme Court established a three-part framework for the allocation of proof in unemployment discrimination cases. "*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-3 (1973). The complaint carries the initial burden of establishing a *prima facie* case of discrimination by showing that: 1) she is a member of a protected class, 2) she was subjected to an adverse employment action or was discharged, 3) she was qualified for the position, and 4) she was replaced by a person outside of the protected class if asserting race, color, or gender discrimination. *Id.* at 802; *Gray v. Toshiba America Consumer Products, Inc.*, 263 F.3d 595,598 (6th Cir. 2001); Mitchell v. Toledo Hosp., 964 F.2d 577,582 (6th Cir. 1992).

In this case, the Plaintiff has not established a *prima facie* case of discrimination.[3] While Title VII prohibits employment discrimination on the basis of

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[3] Typically, once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for its action. Once the defendant offers a legitimate non-discriminatory reason for the employ-

ment decision, the burden shifts back to the plaintiff to show that the reason stated was a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. at 800-03.

race, color, religion, sex or national origin, Ms. Madigan has utterly failed to allege the basis—i.e. race, color, sex—or national origin, Ms. Madigan has utterly failed to allege the basis—i.e. race, color, sex—of her discrimination claim under Title VII. In fact, the Plaintiff has pled no facts showing that her discharge was motivated by discrimination prohibited by Title VII.

At the Plaintiff's deposition, she was asked whether the Defendant's motivation was to discriminate against her in particular or whether the Defendant was trying to get rid of people in general. She responded, "I have no idea". Ms. Madigan's Dep. at 44. Similarly, when asked "[d]o you think that [the Defendant] found flaws in you performance because you're a woman?", the Plaintiff responded, "I have no idea." Ms. Madigan's Dep. at 60.

Although *pro se* pleadings are liberally construed, *Boag v. MacDougal*, 454 U.S. 364,365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), a district court is not required to make the Plaintiff's argument for her. Such a mandate would "require the courts to explore exhaustively all potential claims of a *pro se* plaintiff, ...[and] would...transform the district court from its legitimate advisory role to the improper role of an advocate." *Crawford v. Crestar Foods*, 2000 WL 377349, No. 98-3144 2 (6th Cir. Apr. 6, 2000). The Plaintiff's Second Amended Complaint contains no allegation suggesting the basis for her Title VII claim. Even when faced with a motion for summary

judgment, the Plaintiff's response in opposition to the motion is void of any argument that might support a Title VII claim. Indeed, by her admission at deposition the Plaintiff had no idea whether the Defendant found flaws in her performance because she is a woman. Since the Plaintiff's Second Amended Complaint does not suggest or allude to any facts that she was treated unfairly by her employer because of her race, color, religion, sex or national origin, the Defendant is entitled to summary judgment on this claim. See *Horsfall v. Polyflex Flex Technologies, Inc.*, 1995 WL 376735, No. 95-3172*2 (6th Cir. June 22, 1995)

ADEA Claim

The Age Discrimination in Employment Act of 1967, as amended, proscribes employment discrimination on the basis of age. 29 U.S.C. §621, *et seq.* It states, in pertinent part, as follows:

> It shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...

29 U.S.C. §623(a).

As in Title VII and ADA cases, courts apply the *McDonnell-Douglas* evidentiary framework to determine if a plaintiff has offered enough

circumstantial evidence to infer discrimination.[4] See *Cooley v. Carmike Cinemas, Inc.*, 25F.3d 1325 (6th Cir. 1994). Under the *McDonnell-Douglas* framework, the plaintiff bears the initial burden of proving a *prima facie* case of age discrimination; a plaintiff must plead and prove that: (1) she is a member of a protected class (at least 40 years old); (2); she is qualified to do her job; (3) despite her qualifications, her employment situation was adversely affected; and (4) her position was filled by a younger individual. *Woythal v Tex-Tenn Corp.*, 112 F.3d 243, 246 (6th Cir. 1997).

While the Defendant admits that Plaintiff is a member of a protected class and the Plaintiff claims that she was replaced by a younger individual, the Defendant argues the Plaintiff cannot establish the *prima facie* case of age discrimination because she cannot establish she was qualified for her position. To support this argument to Defendant contends that the Plaintiff's supervisors were not satisfied with her performance and she was not meeting job expectations; specifically, she did not keep up with her job duties and that lead to difficulties in shipping operations.

The Defendant has submitted evidence to support its contention, but the Court cannot ignore the fact that the Plaintiff consistently received positive performance evaluations prior to 1996. While admittedly the performance evaluations show the Plaintiff had problems with teamwork and communications skills throughout her tenure with Nabisco, the evaluations also indicate that the Plaintiff made significant

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[4] In this case, the Plaintiff has provided no direct evidence of age discrimination.

contributions to the company and specifically when technological changes were implemented in her department. Reviewing all of the Plaintiff's performance evaluations in a light most favorable to her, it seems disingenuous for the Court to find she was not qualified for her job.

The Court finds that the Plaintiff arguably has established a *prima facie* case of age discrimination: (1) she is a member of a protected class; (2) she is qualified to do her job; (3) despite her qualifications, her employment situation was adversely affected; and (4) her position was filled by a younger individual.[5] Under the *McDonnell-Douglas* framework, the burden shifts to the Defendant to rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for its decision. "The defendant need not persuade the court that it was actually motivated by proffered reasons ." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Cooley*, 25 F.3d at 1329.

In this instance, the Defendant has produced evidence of a nondiscriminatory reason for its decision to terminate the Plaintiff's employment. The Defendant claims that it terminated the Plaintiff's employment because she was not making performance improvements or displaying an attitude that she wanted to improve. Def.'s Ex. O. The Plaintiff's 1996 performance evaluation was in sharp contrast to previous evaluations and the Defendant detailed the specific problems with the Plaintiff's performance. In 1997, the Defendant met with the Plaintiff at least twice a month to discuss, among other things, her job

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[5] The Plaintiff testified at her deposition that she was replaced by an employee, Melanie Fields. According to the Defendant this employee was approximately 35 years old at the time.

Performance. The Defendant noted various performance problems that were addressed with the Plaintiff and her problems with teamwork and communication skills seemed to be a continuous problem for her. The Defendant's detailed documentation of Plaintiff's performance problems is sufficient proof to establish a nondiscriminatory reason for its decision to terminate the Plaintiff's employment.

As the *prima facie* case is rebutted by the Defendant, the Plaintiff then has the burden to prove by the preponderance of the evidence that the profferd reasons were not the reasons, but in fact, constituted a pretext for intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.s. 502 (1993); Cooley, 25 F.3d at 1329. A plaintiff may establish that the proffered reason was a mere pretext by showing that: 1) the stated reason had no basis in fact; 2) the stated reason was not the actual reason; and 3) that the stated reason was insufficient to explain the defendant's action. *Logan v. Denny's, Inc.*, 259 F.3d 558, 574 (6th Cir. 2001) (citations omitted). "A reason cannot be proved to be 'a pretext for discrimination' unless it is shown both tht the reason was false, and that discrimination was the real reason." *Id.*

The only argument presented by the Plaintiff that might support her burden of proof is that she believed that she was a good employee and that the problems were fabricated by the Defendant. Ms. Madigan's Dep. at 28. However, the Plaintiff presents absolutely no evidence to support her assertion that the Defendant fabricated her performance problems. It is not enough that the Plaintiff impugn the legitimacy of the proffered reasons, she must produce evidence sufficient for a jury to reasonably reject the employer's explanation. *Warfield v. Lebanon Correctional*

Institution, 181 F.3d 723, 730 (6th Cir. 1999). The Plaintiff has failed to do so. Even if the Plaintiff otherwise did offer evidence that the performance evaluations were false, still, she has presented no evidence that discrimination was the real reason for termination of her employment. Having failed to prove that the reasons for the Plaintiff's termination proffered by the Defendant were not the true reasons, but in fact, constituted a pretext for intentional discrimination, the Deendant is entitled to summary judgment on this claim.

ADA Claim

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual..." 42 U.S.C. §12112(a). Covered entities are required to provide "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability...unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 121112(b)(5)(A).

The term "disability" with respect to an individual is defined in the statute as follows:

(a) a Physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(b) a record of such an impairment; or
(c) as being regarded as having such an impairment.

42 U.S.C. §12102(2).

To qualify under the definition of disability, the claimant must first prove a physical or mental impairment. A physical impairment may be defined as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." Toyota Motor Mfg. V. Williams, 122 S.Ct. 681,690 (2002)(citing 45 C.F.R. § 84.3(j)(2)(i)(2001)). For purposes of deciding this motion, the Court will assume that the Plaintiff's multiple sclerosis is a physical impairment within the meaning of the regulations.[6] However, the Supreme Court noted that, "[m]erely having an impairment does not make one disabled for purposes of the ADA." *Id.* (citations omitted). In addition to demonstrating an impairment, a claimant must show the impairment limits a major life activity and that limitation must be substantial. *Id.* (citation Omitted) The Court therefore held "to be substantially limited....an individual must have an impairment that prevents or severely restricts the individual from doing activities that are a central importance to most peoples daily lives.

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[6] The Defendant argues that the Plantiff has not been "diagnosed" with multiple sclerosis. Whether or not Plaintiff actually has the disease does not change the Court's ultimate conclusion; thus for purposes of deciding the motion, the Court will assume that the Plaintiff has this disease.

The impairment's impact must also be permanent or long-term." *Id.* at 691. Moreover, the Court clearly noted,

> [I]t is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection...to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience...substantial.

Id.

In this case, there is no evidence to suggest that the Plaintiff's impairment prevents or severely restricts her from any activities much less those activities that are of central importance to most people's lives. The Plaintiff relies upon a letter from her doctor written to support her claim that she was disabled. Even accepting this letter as a statement that the Plaintiff has an impairment, this is insufficient to establish a disability under the ADA. *Id.* The Plaintiff has offered no evidence that the extent of the limitation in terms of her own experience is substantial. There is a notation in the minutes from the February 4, 1997 meeting with the Plaintiff she would not work on weekends because she has MS and working five days a week is difficult enough. Def.'s Ex O. But, this statement is hardly enough to establish that her impairment prevents or severely restricts her from any activities.

Although the Court will assume the Plaintiff has a physical impairment, she has not established that the impairment substantially limits a major life activity. Thus, the Plaintiff has not established she is disabled within the meaning of ADA. Accordingly, the Defendant is entitled to summary judgment on this claim.

Even if the Plaintiff were able to establish that she is disabled within the meaning of the ADA, the Defendant would still be entitled to summary judgment. The crux of the Plaintiff's claim is that the Defendant failed to provide her with a reasonable accommodation for her disability. Under the ADA, an employer may require medical examinations necessary to the reasonable accommodation process. 29 C.F.R. § 1630.14(c). In this case, Nabisco asked the Plaintiff numerous times for the medical documentation of her disability. The evidence shows that the Plaintiff never provided the requested medical documentation, and even now, the Plaintiff offers no evidence showing that she provided the requested documentation. The Defendant never indicated that it would not accommodate the Plaintiff's disability, it simply required documentation before working with the Plaintiff to implement any measures. Under the ADA, the Defendant was within its right to confirm the Plaintiff's disability. The evidence presented in this case unequivocally shows it was the inaction of the Plaintiff that is to blame, not the Defendant, for the alleged failure to provide an accommodation. Given the state of the evidence, the Court finds the Defendant did not violate the ADA and it is therefore entitled to summary judgment in its favor.

Conclusion

In accordance with the foregoing, the Defendant's Motion for Summary Judgment, ECF # 43, is GRANTED.

IT IS SO ORDERED.

"s/_____
DONALD C. NUGENT
United States District Judge

Dated:_____

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[DATE 11/20/02]

No. 02-3292

Margaret A. Madigan, Plaintiff-Appellee,	)
v.	)
Nabisco Brands/RJ Reynolds, Defendant-Appellant.	)

ORDER

Before: NORRIS and CLAY, Circuit Judges; O'MEARA, District Judge.*

Petitioner seeks rehearing of this court's September 16, 2002, order affirming the district courts judgment in her discrimination action filed under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation

After careful consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. Fed. R. App. P. 40(a).

Accordingly, it is ordered that the petition for rehearing be and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

"s/_____"